

DEPARTMENT OF STATE REVENUE

10-20180058.LOF

**Letter of Findings Number: 10-20180058
Food and Beverage Tax
For Tax Years 2014-15**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Business did not provide any documentation or analysis in support of its protest. Therefore, Business did not meet the burden of proving the proposed assessments wrong.

ISSUE

I. Food and Beverage Tax–Taxable Sales.

Authority: IC § 6-2.5-2-1; IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-9-25-1; IC § 6-9-25-2; IC § 6-9-25-4; IC § 6-9-25-5; IC § 6-9-25-6; *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012).

Taxpayer protests the imposition of food & beverage tax.

STATEMENT OF FACTS

Taxpayer operates an Indiana convenience store with fuel sales. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of food and beverage tax for the tax years 2014, 2015, and 2016. The Department therefore issued proposed assessments for food and beverage tax, penalty, and interest for those years. Taxpayer sent in a written protest of the assessments for 2014 and 2015 and selected the option for the Department to make its determination without holding an administrative hearing. Taxpayer did not list the year 2016 on its protest letter, therefore the proposed assessments for 2016 are not under protest. This Letter of Findings results. Further facts will be supplied as required.

I. Food & Beverage Tax–Taxable Sales.

DISCUSSION

Taxpayer protests the imposition of food and beverage tax on sales at its convenience store/gas station. In the course of the audit, the Department made four (4) separate requests for documentation via first class United States Postal Service mail and by certified mail. Taxpayer did not provide any of the requested documents. The Department therefore based its proposed assessments on the best information available. Taxpayer protests that the Department's proposed assessments are in error and that it has documentation to show that it is correct. Taxpayer filed its written protest along with the Department's "Protest Submission Form" (State Form 56317), in which it opted for the Department to make its final determination without an administrative hearing.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the]

statute even over an equally reasonable interpretation by another party." *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

The food and beverage tax in this matter is imposed under IC § 6-9-25-1, which provides:

- (a) This chapter applies to a county having a population of more than forty-eight thousand (48,000) but less than fifty thousand (50,000).
- (b) The county described in subsection (a) is unique because:
 - (1) governmental entities and nonprofit organizations in the county have successfully undertaken cooperative efforts to promote tourism and economic development; and
 - (2) several unique tourist attractions are located in the county, including:
 - (A) the Indiana basketball hall of fame;
 - (B) the Wilbur Wright birthplace memorial; and
 - (C) a historic gymnasium.
- (c) The presence of these unique attractions in the county has:
 - (1) increased the number of visitors to the county;
 - (2) generated increased sales at restaurants and other retail establishments selling food in the county; and
 - (3) placed increased demands on all local governments for services needed to support tourism and economic development in the county.
- (d) The use of food and beverage tax revenues arising in part from the presence of the attractions identified in subsection (b)(2) to support tourism and economic development in the county permits governmental units in the county to diversify the revenue sources for which local government improvements and services are funded.

IC § 6-9-25-2 provides:

The definitions in [IC 6-9-12-1](#) apply throughout this chapter.

IC § 6-9-25-4 states:

- (a) Except as provided in subsection (c), a tax imposed under section 3 of this chapter applies to any transaction in which food or beverage is furnished, prepared, or served:
 - (1) for consumption at a location, or on equipment, provided by a retail merchant;
 - (2) in the county in which the tax is imposed; and
 - (3) by a retail merchant for consideration.
- (b) Transactions described in subsection (a)(1) include transactions in which food or beverage is:
 - (1) served by a retail merchant off the merchant's premises;
 - (2) food sold in a heated state or heated by a retail merchant;
 - (3) two (2) or more food ingredients mixed or combined by a retail merchant for sale as a single item (other than food that is only cut, repackaged, or pasteurized by the seller, and eggs, fish, meat, poultry, and foods containing these raw animal foods requiring cooking by the consumer as recommended by the federal Food and Drug Administration in chapter 3, subpart 3-401.11 of its Food Code so as to prevent food borne illnesses); or
 - (4) food sold with eating utensils provided by a retail merchant, including plates, knives, forks, spoons, glasses, cups, napkins, or straws (for purposes of this subdivision, a plate does not include a container or packaging used to transport the food).
- (c) The county food and beverage tax does not apply to the furnishing, preparing, or serving of any food or beverage in a transaction that is exempt, or to the extent exempt, from the state gross retail tax imposed by [IC 6-2.5](#).

IC § 6-9-25-5 states:

The county food and beverage tax imposed on a food or beverage transaction described in section 4 of this chapter equals one percent (1[percent]) of the gross retail income received by the merchant from the transaction. *For purposes of this chapter, the gross retail income received by the retail merchant from such a transaction does not include the amount of tax imposed on the transaction under [IC 6-2.5](#).* (Emphasis added).

IC § 6-9-25-6 provides:

The tax that may be imposed under this chapter shall be imposed, paid, and collected in the same manner that the state gross retail tax is imposed, paid, and collected under [IC 6-2.5](#). However, the return to be filed for the payment of the taxes may be made on separate returns or may be combined with the return filed for the payment of the state gross retail tax, as prescribed by the department of state revenue. (Emphasis added).

Therefore, the food and beverage tax is imposed in the same manner as sales tax as provided under the provisions of IC § 6-2.5.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. *The retail merchant shall collect the tax as agent for the state. (Emphasis added).*

Therefore, retail merchants are required to collect sales tax on retail transactions, unless the transaction is exempt from sales tax.

Next, the Department refers to IC § 6-8.1-5-1(b), which states:

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to [IC 6-8.1-10](#) concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail. (Emphasis added).

Also, the Department refers to IC § 6-8.1-5-4(a), which states:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. *The records referred to in this subsection include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and canceled checks. (Emphasis added).*

Therefore, all taxpayers subject to a listed tax must keep books and records such as, but not limited to, invoices, register tapes, receipts, and cancelled checks, as provided by IC § 6-8.1-5-4(a). If the Department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department, as provided by IC § 6-8.1-5-1(b). In the instant case, the Department had no records to review and so used the best information available in reaching its conclusion that Taxpayer did not report the proper amount of tax due.

In this case, Taxpayer has not provided any analysis or documentation in support of its bare protest of the assessments for 2014 and 2015. Taxpayer has not presented a sufficiently developed argument for the Department to address. See *Wendt LLP v. Indiana Dept. of State Revenue*, 977 N.E.2d 480, 485 n.9, (Ind. Tax Ct. 2012) (stating in a footnote parenthetical "that poorly developed and non-cogent arguments are subject to waiver" by the Indiana Tax Court) (citing *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax. Ct. 2010)). Therefore, Taxpayer has failed to meet the requirement of proving the proposed assessments wrong, as provided by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

February 26, 2018

Posted: 04/25/2018 by Legislative Services Agency
An [html](#) version of this document.